FEDERAL LAND DEVELOPMENT AUTHORITY & ANOR v. TAN SRI HJ MOHD ISA DATO' HJ ABDUL SAMAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN MOHD GHAZALI J
[WRIT SUMMONS NO: WA-22NCVC-843-11-2019]
15 JULY 2021

CIVIL PROCEDURE: *Proceedings – Consolidation – Application for – Application to consolidate suits – One suit based on conspiracy and fraud while other suit based on defamation – Whether there were common questions of law or fact arising from suits – Whether there was substantial overlap in issues – Whether same key witnesses – Whether witness statements between both suits related – Whether there would be prejudice if suits not consolidated – Whether there was risk of res judicata, preventing litigation of common issues if one suit is determined first – Whether there would be complexities if suits consolidated – Whether time and cost-saving – Rules of Court 2012, O. 4 r. 1*

The seventh defendant, Synergy Promenade Sdn Bhd ('SP'), had filed separate defamation actions on different dates against (i) the second defendant, Tan Sri Sharil Ab Samad; (ii) New Straits Times Press (M) Bhd ('NSTP') and its journalist; and (iii) NSTP and another journalist. The three suits were consolidated to be tried together ('defamation suits'). The plaintiffs filed the instant writ action, alleging conspiracy to defraud, against 21 defendants ('Suit 843'). However, NSTP and its journalists were not parties in the instant suit. The fifth to seventh defendants in Suit 843 were the plaintiffs in the defamation suits. The plaintiffs later filed the present application, pursuant to O. 4 r. 1 of the Rules of Court 2012 ('ROC') for Suit 843 to be tried together with the defamation suits. In support of the application, the plaintiffs submitted that (i) there were some common questions of law or fact arising in Suit 843 and the defamation suits; (ii) there was a substantial overlap in the issues in Suit 843 and the defamation suits, as could be seen from the trial documents in the defamation suits and the issues in Suit 843; (iii) the factual assertions made in the witness statements of the second and fifth defendants in the defamation suits substantially related to the dealings between the plaintiffs, the seventh and eighth defendants, the Semarak lands and the issues in Suit 843; (iv) the plaintiffs would suffer prejudice if the application was refused since, if the common issues were tried in the defamation suits without the participation of the plaintiffs and the defendants in Suit 843, the court may not be able to reach a proper finding on those issues. There was also prejudice if the findings on these common issues in the defamation suits were binding on the plaintiffs even though they were not the parties to the defamation suits; (v) there was a risk that the defendants in Suit 843 may raise the issue of *res judicata* and prevent the plaintiffs from litigating these common issues in Suit 843 if they have been determined first in the defamation suit; and (vi) if they were separately tried,

some of the key individuals would be likely to be summoned to appear as witnesses in both Suit 843 and the defamation suits to give evidence substantially on the same issues of fact.

Held (dismissing application):

(1) There could be no common questions of law for Suit 843, which alleged conspiracy and fraud, since the claim here was contractual in nature and involved issues concerning the formation of contract while the defamation suits, on the other hand, were based on claims of tortious liability. These were wholly different principles of law. The causes of action for the defamation suits were predicated on the law of tort. The subject matter were the defamatory statements allegedly published by the defendants. The issues to be determined in the defamation suits would be the usual in any defamation action, as established under the law which revolves around the questions whether the statements were defamatory, whether they referred to the plaintiffs, whether they were published to a third person and whether the defendants were entitled to the defences pleaded. Furthermore, a suit is determined within the confines of the pleadings of parties and the evidence adduce in support during the trial of the suit. Suit 843 involved pleadings and evidence that were outside the ambit of the defamation suits. It was legally flawed for parties in the defamation suits to be bound by findings that were outside the pleadings of these respective suits and be bound by evidence that were unable to test in trial. (paras 19, 21 & 22)

(2) It would be incorrect for the plaintiffs to contend that if they were successful in Suit 843, then the defamation suits would fail because the defendants in the defamation suits would be able to succeed in their defences of justification and fair comment. Regardless of the outcome of Suit 843, the defendants in the defamation suits would still have to prove their defences on the basis of the established principles of the law on defamation. As such, there were no real risks of inconsistent findings or *res judicata* should the trial of the defamation suits was to precede that of Suit 843. (paras 28 & 29)

(3) The reliefs sought in the defamation suits were an injunction restraining the defendants from further speaking, publishing or causing to be published the alleged defamatory statements and special, general and aggravated or exemplary damages. The key reliefs sought in Suit 843 were a declaration that the agreements and instruments executed were unenforceable, null, void *ab initio* and damages against the 20 defendants. It could not be denied that whilst the rights and reliefs claimed in the defamation suit – confined to damages and in Suit 843 arose out of the same transaction, they were entirely different in nature. Because the defamation suits were tortious in nature and the reliefs, if

awarded, were based on entirely different principles to those in Suit 843, which were contractual in nature and related to issues surrounding the formation of contracts, the plaintiffs could not be prejudiced if the defamation suits precede the determination of Suit 843. Nor could there be true inconsistency since the suits involved different principles of law. (paras 31-34)

(4) The paramount consideration in this application was whether there would be risks of inconsistent findings and decisions in respect of the common issues if Suit 843 and the defamation suits were tried separately. There was the weighty issue about the different capacities of the parties in the different suits. For some, their roles were reversed. For instance, the plaintiffs in the defamation suits were the fifth to seventh defendants in Suit 843. This means that a consolidation would result in a cross action. At the same time, the defendants in the defamation suits were not even parties in Suit 843. All the parties in the defamation suits were against this application. The applicants, namely the plaintiffs in Suit 843, who asked for Suit 843 to be heard before the defamation suits, were not even parties to the defamation suits. When there are parties in one suit who are not parties in the other suit, the application should be refused. Out of the total 26 parties in the defamation suits and Suit 843, there were only four parties that were present in both. These 22 parties would suffer prejudice and embarrassment if this application was allowed. (paras 37 & 40-43)

(5) Although it may seem that time and costs would be saved, that would not actually be the case in view of the different plaintiffs, different causes of action, different issues and different arguments. Indisputably, a consolidation in this case would not outweigh any savings on time and costs, and serve only to complicate and delay the just, expeditious and economical disposal of especially the defamation suits and Suit 843. (para 46)

(6) Yet another concern with consolidation or having the suits heard together or one immediately after the other is the question of legal representation of the various parties. The facet of complexity was the different set of lawyers involved in the two groups of proceedings. There were 14 firms of solicitors acting for their respective clients in Suit 843 and three firms of solicitors acting for their respective clients in the defamation suits. The separate representations would likely render the consolidation inconvenient if not impractical, resulting in an unnecessary waste of judicial time, of costs as a large number of solicitors would be required to be present in court for case managements of matters which do not concern their clients, as well as other challenges such as the difficulty of fixing trial dates. Furthermore, the solicitors

representing the 21 defendants in Suit 843 would have to hear and examine the evidence and testimony given by witnesses in open court in Suit 843 and the defamation suits and vice versa. Certain defendants in Suit 843 were also witnesses in the defamation suits. (paras 57, 58 & 60)

(7) The plaintiffs in Suit 843 only filed this application when the court was ready to fix new trial dates for the defamation suits. No convincing or reasonable explanation was proffered to justify this late filing when Suit 843 was filed about one year prior and where the defamation suits were instituted even earlier, about one year before the filing of Suit 843. The plaintiffs could also be said to be potentially guilty of laches for the delay in the filing of this application. Their averment that they only came to know about the defamation suits on 12 November 2020 was difficult to be accepted, given that the very first of the defamation suits was filed on 4 June 2018, some two and a half years prior. It was also unfair to have the defamation suits hanging over the heads of the parties, probably potentially indefinitely because of the uncertainty as to when Suit 843 would be ready for trial. Resort to O. 4 r. 1 of the ROC was plainly unsuited in a situation where one of the suits is at an advanced stage of the proceedings, in comparison to the other. The defamation suits were ready for trial and ought to have started on 26 October 2020 if not for the Movement Control Order in force then. This was in contrast to Suit 843 which had not even reached the stage of the close of pleadings. The defamation suits should be allowed to proceed in a just, expeditious and economical manner unimpeded by the status of Suit 843. (paras 61-63 & 66-67)

Case(s) referred to:

Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd [2021] 2 CLJ 222 HC ***(refd)***

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1978] 1 LNS 20 FC ***(refd)***

Datuk Chen Lip Keong & Anor v. Datuk Mohd Fathi Hj Ahmad & Another Action [1993] 1 LNS 108 HC ***(refd)***

Hiwood United Sdn Bhd v. All Season Realty Sdn Bhd & Ors [2018] 1 LNS 743 HC ***(refd)***

Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd [2019] 6 CLJ 292 CA ***(refd)***

MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 6) [1998] 3 CLJ Supp 390 HC ***(refd)***

MCAT Gen Sdn Bhd v. Celcom (M) Bhd [2007] 10 CLJ 356 HC ***(refd)***

Ng Joo Soon @ Nga Ju Soon v. Devechem Holdings (M) Sdn Bhd & Ors [2010] 1 LNS 1677 HC ***(refd)***

Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd [2013] 1 LNS 984 CA ***(refd)***

Sykt Multi Wood v. Foosan Timber Industries Sdn Bhd & Anor [1992] 4 CLJ 1915; [1992] 3 CLJ (Rep) 623 HC ***(refd)***

Legislation referred to:
Land Development Act 1956, s. 3(3)(c)
Rules of Court 2012, O. 4 r. 1

For the plaintiff - Kumar Kangasingam, CS Mong & Medha Ong; M/s Lee Hishammuddin Allen & Gledhill
For the 1st defendant - Mohd Hafarizam Harun & Norhazira Abu Haiyan; M/s Mohd Hafarizam Harun
For the 2nd defendant - Ranjit Singh; M/s Ranjit Singh & Yeoh
For the 3rd defendant - Mohd Munzeer Zainul Abidin; M/s Hifdzi Salmiah Kee Hanisah & Co
For the 4th defendant - Azhar A Ali; M/s A Arman & Co
For the 5th - 8th defendants - RK Sharma, Amrit Pal Singh, Austen Pereira & Ng Jun Wei; M/s Amrit & Company
For the 11th defendant - Nur Shuhada; M/s Rhiza & Richard
For the 12th - 15th defendants - Anita Chan; M/s Azim, Tunku Farik & Wong
For the 16th defendant - Vishal Kumar & Hanani Hadi; M/s James Monteiro
For the 18th defendant - Premman Gopal; M/s Omar Ismail Hazman & Co
For the 19th defendant - Hussin Razak; M/s Mohd Irwan Mohd Mubarak
For the 20th defendant - Nur Syazlin; M/s Lope Maizura
For the 21st defendant - Nur Suraya Amir; DPP

(Case Nos: WA-23CY-26-06-2018, WA23CY-31-06-2018 & 23CY-22-04-2019 (Defamation Suits))
For the plaintiffs - Ken St James & Jonathan; M/s Ken St James

(Case Nos: WA-23CY-31-06-2018 & WA-23CY-22-04-2019) (Defamation Suits))
For the defendants - Rueben Mathiavaranam & Angeline; M/s TH Liew & Partners

(Case No: WA-23CY-26-06-2018) (Defamation Suits))
For the defendant - Ranjit Singh & Nicholas Yap; M/s Daniel & Wong

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Mohd Ghazali J:

Introduction

[1] This is an application filed by the plaintiffs for the present suit to be tried together with a set of three other suits under O. 4 r. 1 of the Rules of Court 2012. At the conclusion of the hearing *via* Zoom, the application, which was opposed by all defendants in this suit and all parties in the other suits, was dismissed, and the principal grounds for the decision were highlighted to the parties. This judgment contains the full reasons for my decision.

Key Background Facts

[2] On 4 June 2018, Synergy Promenade Sdn Bhd ("Synergy Promenade") filed a defamation action ("Suit 26") against Tan Sri Sharil Ab Samad. The former is the seventh defendant in the instant suit whilst the latter is the second defendant.

[3] On 12 June 2018, Synergy Promenade filed a suit against New Straits Times Press (M) Berhad ("NSTP") and its journalist Che Wan Badrul Alias ("Suit 31") for alleged defamation for publishing various news articles.

[4] On 17 May 2019, Synergy Promenade filed another defamation action against NSTP and another of its journalist, Ahmad Suhael Adnan ("Suit 22"). NSTP and its two journalists are not parties in the instant suit.

[5] Pursuant to orders dated 13 June 2019 and 16 January 2020, all three Suit 26, Suit 31 and Suit 22 were directed to be consolidated and tried together (collectively, "the defamation suits").

[6] On 14 November 2019, the plaintiffs filed the instant writ action alleging conspiracy to defraud against 21 defendants ("Suit 843"). It is to be noted that the fifth, sixth and seventh defendants in this Suit 843 are the plaintiffs in the defamation suits.

[7] One year later, on 27 November 2020, the plaintiffs in this Suit 843 filed this application under O. 4 r. 1 of the Rules of Court 2012 ("the RC 2012") for the defamation suits be tried immediately after the trial of this Suit 843. This is the instant encl. 206.

The Principal Grounds In Support Of The Application

[8] The first point advanced by the plaintiffs in support of their application is the argument that there are some common questions of law or fact arising in Suit 843 and the defamation suits.

[9] These include whether the approval of the Minister pursuant to s. 3(3)(c) of the Land Development Act 1956 had been obtained in respect of the KLVC project and the relevant development agreement, whether the appointment of Synergy Promenade as the master developer of the KLVC project was properly carried out, whether the defendants committed fraud or conspiracy to defraud the first plaintiff, whether the transfer or acquisitions of the first plaintiff's Semarak lands by the seventh and eighth defendants was wrongful and illegal, and whether the first plaintiff received any payment or monetary consideration in respect of the sale and transfer of its Semarak lands under the relevant sale and purchase agreements and the memorandum of transfer.

[10] The plaintiffs then argued that there is substantial overlap in the issues in Suit 843 and defamation suits as can be seen from the trial documents in the defamation suits which substantially relate to the dealings between the plaintiffs, the seventh and eighth defendants, the Semarak lands and the issues in Suit 843.

[11] The factual assertions made in the witness statements of the second and fifth defendants (in the defamation suits) substantially relate to the dealings between the plaintiffs, the seventh and eighth defendants, the Semarak lands and the issues in Suit 843. This Suit 843 and the defamation suits would both require a determination of the issues common to the suits.

[12] This is especially when all the defendants in the defamation suits are relying on the defences of justification and fair comment which require a determination of the true facts. Apart from the alleged defamatory statements in the defamation suits, both Suit 843 and defamation suits involve dealings or disputes between among others the plaintiffs, the fifth to the eighth defendants concerning the KLVC project and the related disputed agreements and instruments.

[13] Reference is made by the plaintiffs to the decision of the Court of Appeal in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd* [2019] 6 CLJ 292 where the requirements under O. 4 r. 1 were held to have been satisfied given the existence of common facts and issues in the two suits involved. The Court of Appeal also held:

> [13] In conclusion, we have to reiterate that it would be unjust to both parties to allow their respective claims to go before two different judges whose decisions may conflict with each other, and this probable outcome must be avoided at all cost.

[14] It was also submitted by the plaintiffs that they will suffer prejudice if the application is refused since among others, if the common issues are tried in the defamation suits without the participation of the plaintiffs and the defendants in Suit 843, this court may not be able to reach a proper finding on those issues. There is also prejudice if the findings on these common issues in the defamation suits are binding on the plaintiffs even though they are not parties to the defamation suits.

[15] There is additionally a risk that the defendants in this Suit 843 may raise the issue of *res judicata* and prevent the plaintiffs from litigating these common issues in Suit 843 if they have been determined first in the defamation suit. On top of that, the plaintiffs also posited that if they are separately tried, some of these key individuals would be likely to be summoned to appear as witnesses in both Suit 843 and defamation suits to give evidence substantially on the same issues of fact.

[16] This application is resisted by all the defendants in this Suit 843 and by all the litigants in the defamation suits. Most of these parties have furnished written submissions setting out their grounds for opposing the application and some have also submitted to that effect during the hearing.

Evaluation And Findings Of This Court

[17] The starting point of this analysis must be the provisions of O. 4 r. 1 of the RC 2012 which read as follows:

> **4. Consolidation of proceedings**
>
> **1. Consolidation of causes or matters (O. 4 r. 1)**
>
> (1) Where two or more causes or matters are pending, and if it appears to the Court that:

A (a) some common question of law or fact arises in both or all of them;

(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

B (c) for some other reason it is desirable to make an order under this rule,

the Court may order the causes or matters to be consolidated on such terms as it thinks just or may order the causes or matters to be tried at the same time or one immediately after another or may order any of the causes or matters to be stayed C until after the determination of any other of the causes or matters.

(2) An order for consolidation shall be made in Form 1 and shall direct that the cause or matter in which the application is made shall be carried on as or under such other cause or matter and D that the title of such other cause or matter be amended by adding thereto the title of the cause or matter in which the application is made.

(3) Upon such order being made, the file of the cause or matter in which the application is made shall be transferred to and added to the file of such other cause or matter, and the copy of the E order shall be left in place of the file so transferred, and a memorandum of the transfer shall be entered in the cause book against the cause or matter so consolidated.

[18] The main objective of consolidation is to save costs, time and effort, and to make the conduct of several actions more convenient by treating them F as one action (see the Court of Appeal decision in *Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984; [2014] 1 MLJ 461). The conditions in O. 4 r. 1 are to be read disjunctively such that satisfaction of any one of the conditions would suffice.

G *Whether There Are Common Questions Of Law Or Fact*

[19] There can, in my view, be no common question of law for this Suit 843 which alleges conspiracy and fraud since the claim here is contractual in nature and involves issues concerning the formation of contract whilst for the defamation suits on the other hand are based on claims of tortious H liability. These are wholly different principles of law.

[20] In Suit 843, the plaintiffs are challenging the validity of the agreements and instruments executed for the KLVA project on the primary grounds of illegality under s. 3(3)(c) of the Land Development Act 1956 (whether the said provision was complied with *vis-à-vis* the KLVC project and whether the I agreements and instruments for KLVC project were valid and enforceable) and of conspiracy to injure, involving fraud and breach of fiduciary duties against the first 20 defendants.

[21] The causes of action for the defamation suits are predicated on the law of tort. The subject matter are the defamatory statements allegedly published by the defendants therein. The issues to be determined in the defamation suits would be the usual in any defamation action as established under the law which revolve around the questions whether the statements are defamatory, whether they refer to the plaintiffs, whether they were published to a third person, and whether the defendants are entitled to the defences pleaded.

[22] It is trite that a suit is determined within the confines of the pleadings of parties and the evidence adduced in support during the trial of the suit. Suit 843 involves pleadings and evidence that are outside the ambit of the defamation suits. It is legally flawed for parties in the defamation suits to be bound by findings that are outside the pleadings of these respective suits and be bound by evidence that they are unable to test in trial.

[23] There is a common subject matter in the defamation suit in that the alleged defamatory statements revolve around the Synergy Promenade (the seventh defendant in this Suit 843), the KLVC project and the first plaintiff's loss of its Semarak lands. But the main consideration here is that many elements arise only in one suit but not in the other. For instance, in pleading fair comment, an evaluation must be made in the defamation suits whether the comments in question related to a public interest matter. But this is entirely not relevant in Suit 843.

[24] Further, NSTP and its two journalists in the defamation suits have stated that quite apart from relying on the defence of justification, they would also be employing the defamation-specific defence of *Reynolds*' privilege, which determination has nothing to do with Suit 843.

[25] The said common issues articulated by the plaintiffs in this Suit 843 are their own interpretation of the factual and legal questions which they think they need to answer in order to obtain the reliefs that they seek which include to set aside the relevant contractual agreements. However, the plaintiffs in the defamation suits take the view that there is only that one common subject matter of the KLVC project. I agree with the submission of the plaintiffs in the defamation suits that such a common subject matter does not relate to any common question of law or fact between this Suit 843 and the defamation suits.

[26] In other words, a mere common subject matter, with no common question of law or fact, is simply insufficient to justify the granting of the order under O. 4 r. 1 for this court to try the Suit 843 and the defamation suits, the former before the latter. In the case of *Ng Joo Soon @ Nga Ju Soon v. Devechem Holdings (M) Sdn Bhd & Ors* [2010] 1 LNS 1677; [2010] MLJU 1854 the court expressed the following:

A [13] Yet another consideration which weighed against the grant of the orders sought was in the common question/fact identified. The Respondents' claim of the Petitioner's "Self Serving Scheme" as the common question of law and/or fact was in fact only the views expressed from the Respondents' perspective. *To me, this missed the point that in framing and identifying common questions of law and/or fact, it must surely be considered*
B *from the perspective of the whole case and having regard to the arguments put forth by all sides.* As mentioned earlier, the defences filed in the Shah Alam Suit which has since been consolidated with the writ action from Johor Bahru or even the cause papers in that latter action were not made available for consideration. Other than that allegation of a pursuit of a "Self-Serving Scheme", there was actually no question of law or even fact identified for
C consideration. With the examination of the factual matrix, the reliefs sought in both proceeding and the other matters that have been discussed, I cannot also see how the matter of conflicting decisions can arise. (emphasis added)

[27] Regard may also be had to the case of *Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd* [2021] 2 CLJ 222, where the High Court held
D that:

[17] In my considered view, at first blush there does not appear to be a sharing of a common subject matter in the current suit and in OS146, ie, the powers of Bursa to impose fines. However, a mere sharing of a
E common subject matter alone is not a sufficient ground for an order to consolidate the two matters.

[28] It would thus be incorrect for the plaintiffs here to contend that if they are successful in this Suit 843, then defamation suits will fail because the defendants in the defamation suits would be able to succeed in their defences
F of justification and fair comment. At best, this is a misleading submission since regardless of the outcome of this Suit 843, the defendants in the defamation suits will still have to prove their defences on the basis of the established principles of the law on defamation.

G **[29]** As such, there are in truth no real risks of inconsistent findings or *res judicata* should the trial of the defamation suits is to precede that of this Suit 843.

[30] I also cannot disagree with the suggestion that to address this issue of inconsistent findings and *res judicata*, parties in this Suit 843 and the
H defamation suits could try to adopt the common stance that the findings in the defamation suits will not bind this Suit 843, and *vice versa*.

Whether The Rights To Relief Are In Respect Of The Same Series Of Transactions

[31] The reliefs sought in the defamation suits are an injunction restraining the defendants from further speaking, publishing or causing to be published
I the alleged defamatory statements, and special, general as well as aggravated or exemplary damages.

[32] The key reliefs sought in Suit 843 are a declaration that the agreements and instruments executed for KLVC project are unenforceable, null, void *ab initio*; and damages against the 20 defendants. A

[33] It cannot be denied that whilst the rights and relief claimed in the defamation suits – confined to damages, and in this Suit 843 arise out of the same transaction, they are entirely different in nature. B

[34] Because the defamation suits are tortious in nature and the reliefs, if awarded, are based on entirely different principles to those in this Suit 843 which are contractual in nature and relates to issues surrounding the formation of contracts, the plaintiffs cannot be prejudiced if the defamation suits precede the determination of the Suit 843. Nor can there be true inconsistency since the suits involve different principles of law. This is not to mention that the court will in any event be bound by the well-entrenched principle of *stare decisis*. C

Whether There Are Some Other Reasons Making It Desirable To Make An Order To Consolidate D

[35] It should be noted that the plaintiffs did argue that the parties in the defamation suits (the three suits therein) have earlier agreed for them to be tried together even though the parties therein are not identical. As such, the second, fifth, sixth and seventh defendants as well as NSTP and its two journalists should not be allowed to blow hot and cold in their resistance to the instant application. E

[36] In the final analysis, this court inevitably will be required to make findings and decisions on the common issues in light of the positions taken by the parties in Suit 843 and defamation suits on the propriety of the dealings in the KLVC project. F

[37] The paramount consideration in this encl. 206 is whether there would be risks of inconsistent findings and decisions in respect of the common issues if Suit 843 and defamation suits are tried separately (see the Court of Appeal decision in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd* (*supra*)). G

[38] It cannot be emphasised enough that the court should make an order under O. 4 r. 1 where there is a risk that two inconsistent judgments will come into existence if the order is not made. The former Federal Court in *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1978] 1 LNS 20; [1979] 2 MLJ 244, in the judgment written by Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) held thus: H

> *The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject-matter of the actions "to render it desirable that the whole should be disposed of at the same time"* (*Payne v. British Time Recorder Co.* [1921] 2 KB 16, *Horwood v. British Statesman* I

A *Publishing Co. Ltd.* [1929] WN 38, *Daws v. Daily Sketch* [1960] 1 WLR 126; [1960] 1 All ER 397. Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

Now, the causes of action in this third party proceeding and Civil Suit No 2323 of 1976, where the plaintiffs and the defendants are the same, arise
B out of the same series of transactions, ie, purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, eg, where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.

We may add that in such circumstances, one of the tests in deciding
C whether consolidation should be ordered is to determine whether two inconsistent Judgements will come into existence if it is not ordered.

(emphasis added)

[39] But as highlighted above, it is imperative for this court to ascertain that the common questions are genuinely of sufficient importance in proportion
D to the rest of the subject matter of the suits in contention. This, in my view, is where the plaintiffs fall short. Whilst a common subject matter may exist, that alone is outweighed by other questions that could potentially arise from the Suit 843 and the defamation suits. It will be readily appreciated that other aspects of the suits have given rise to other compelling considerations that
E militate strongly against the granting of the order as now sought by the plaintiffs in this Suit 843.

Mostly Different Parties In Different Suits

[40] First, there is the weighty issue about the different capacities of the
F parties in the different suits. For some, their roles are reversed. For instance, the plaintiffs in the defamation suits are the fifth, sixth and seventh defendants in this Suit 843.

[41] This means that a consolidation herein would result in a cross-action. The High Court in *Sykt Multi Wood v. Foosan Timber Industries Sdn Bhd &*
G *Anor* [1992] 4 CLJ 1915; [1992] 3 CLJ (Rep) 623, dismissed the plaintiffs' application for consolidation by reason that a cross-action, where the plaintiff in one proceeding is the defendant in another, cannot be consolidated. The High Court ruled as follows:

Cross-actions, in my opinion, cannot be consolidated. In a consolidated
H action, the plaintiffs are in the same condition as co-plaintiffs. In the case of cross-actions this is impossible because the plaintiff in one action is the defendant in another. The same person cannot be both a plaintiff and a defendant in an action. *Ellis v. Kerr* [1910] Ch. 529 @ 537.

I

[42] At the same time, the defendants in the defamation suits specifically Suit 31 and Suit 22 are not even parties in this Suit 843. The plaintiffs here are not parties in the defamation suits. Seventeen defendants in this Suit 843 are also not parties and cannot participate in the defamation suits. Conversely, the defendants in the defamation suits, namely, NSTP, Che Wan Badrul Alias and Ahmad Suhael Adnan are not parties and cannot participate in this Suit 843.

[43] All the parties in the defamation suits are against this application. The applicants, namely the plaintiffs in this Suit 843 who asked for this Suit 843 to be heard before the defamation suits are not even parties to the defamation suits.

[44] It is also to be observed that when there are parties in one suit who are not parties in the other suit, the application should be refused. In the case of *Ng Joo Soon* (*supra*) it was held that:

> [15] … In fact, prejudice and embarrassment may be occasioned especially to third parties like the 2nd and 3rd Defendants who are not parties in both proceedings if the application was allowed. Under such circumstances, it would certainly not be desirable for the application to be allowed.

[45] Here, out of the total 26 parties in the defamation suits and this Suit 843, there are only four parties that are present in both. These 22 parties would suffer prejudice and embarrassment if this application is allowed.

[46] In other words, although it may seem that time and costs would be saved, that would not actually be the case in view of the different plaintiffs, different causes of action, different issues and different arguments. Indisputably, a consolidation in this case would not outweigh any savings on time and costs, and serve only to complicate and delay the just, expeditious and economical disposal of especially the defamation suits and this Suit 843.

[47] It should also be observed that in *MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 6)* [1998] 3 CLJ Supp 390 the High Court in disallowing the consolidation application held that a litigant should not have to pay for unnecessary cost to spend time listening to matters and evidence that do not concern him.

[48] Further, in the case of *Hiwood United Sdn Bhd v. All Season Realty Sdn Bhd & Ors* [2018] 1 LNS 743, it was held that:

> [23] The plaintiff's counsel submitted that there are common parties and witnesses in both the suits. That submission does not warrant this Court to allow the plaintiff's application because having common parties and witnesses in the two suits is not the deciding factor for this Court to grant the order. This submission would carry weight only if the common parties could have been joined as parties within the rules as envisaged in Order

15 rule 4 of the Rules of Court 2012 – Joinder of parties (see Federal Court decision in *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1979] 1 LNS 9; [1979] 2 MLJ 244).

[49] Even though there are four parties involved in both Suit 843 and the defamation suits, only the second defendant (Tan Sri Sharil bin Ab Samad) is named as defendant in both proceedings. This is the one and only common defendant in Suit 843 and the defamation suits.

[50] Moreover, reliance by the plaintiffs on the case of *MCAT Gen Sdn Bhd v. Celcom (M) Bhd* [2007] 10 CLJ 356; [2007] 8 MLJ 277 is not entirely valid for the plaintiffs in the different suits there, are the same whilst the plaintiffs in the case before this court in Suit 843 are not the plaintiffs in the defamation suits.

[51] It ought to be stated that the leading case of *Central Securities (Holdings) Bhd* (*supra*) too involved the same parties, unlike the situation now before this court. And in the case of *Datuk Chen Lip Keong & Anor v. Datuk Mohd Fathi Hj Ahmad & Another Action* [1993] 1 LNS 108; [1994] 1 MLJ 1, although the plaintiff in the first suit was also the defendant in the second suit, unlike the instant case before me, there was however no objection raised by the counsel for the plaintiff in that second suit for both matters to be consolidated.

[52] The plaintiffs here at the same time are essentially seeking for Suit 843 to be determined first whilst the defamation suits be stayed, effectively also seeking for the parties in the defamation suits to be bound by the findings in Suit 843 in respect of the common issues as asserted.

[53] However, in Suit 843 the burden is on the plaintiffs to prove the said common issues insofar as they relate to the alleged conspiracy. But in the defamation suits, the burden is on the defendants, namely Tan Sri Sharil (also the second defendant in Suit 843), NSTP and its two journalists to prove the common issues to the extent they relate to their respective defences for defamation. Thus the parties to the defamation suits would be prejudiced if they are not afforded the opportunity to prove their own case in the manner they deem fit and instead be bound by the findings made in a trial that is prosecuted outside their control.

[54] For instance, FELDA as the first plaintiff in Suit 843 has the burden to prove the alleged conspiracy that the Semarak lands had been, say, fraudulently appropriated *via* the relevant sale and purchase agreements. For Tan Sri Sharil, as a defendant in one of the defamation suits, in pursuing the plea of justification, he has the onus of proving that the said sale and purchase agreements were indeed fraudulent. However, he is also the second defendant in Suit 843.

[55] In this Suit 843, be may expectedly be reliant on evidence produced by FELDA to prove the same fact that he may wish to establish, yet he is a defendant in that proceedings. For Tan Sri Sharil (a defendant in the defamation suits and the second defendant in Suit 843) there may thus be a real risk that he is bound by any failure of the plaintiffs to prove their case in Suit 843 where he is the second defendant. On the other hand, the other defendants in the defamation suits namely NSTP and its two journalists are not parties to the Suit 843 and do not face such risks.

[56] And not only that. The second, fifth, sixth and seventh defendants in Suit 843 too would potentially be placed in a difficult and embarrassing position as they appear as parties in the relevant actions in the defamation suits, giving evidence against one another, but at the same time are co-defendants in the Suit 843 giving evidence against the two plaintiffs. The risks of self-incrimination, of giving of evidence in part or by way of instalments, and in the re-calling of witnesses, cannot be easily dismissed.

Different Sets Of Solicitors

[57] Yet another concern with consolidation or having the suits heard together or one immediately after the other is the question of legal representation of the various parties. The facet of complexity is the different sets of lawyers involved in the two groups of proceedings. There are 14 firms of solicitors acting for their respective clients in the Suit 843 and three firms of solicitors acting for their respective clients in the defamation suits.

[58] The parties who appear in both Suit 843 and the defamation suits namely the second, fifth, sixth and seventh defendants have engaged different firms of solicitors in the different proceedings. The second defendant appointed Messrs Daniel & Wong to represent him in the defamation suits (Suit 26) but engaged Messrs Ranjit Singh & Yeoh in the Suit 843. The fifth, sixth and seventh defendants have Messrs Ken St James in the defamation suits but engaged Messrs Amrit & Company to represent them in the Suit 843. It is a general rule that co-plaintiffs must be jointly represented by a single firm of lawyers. Here, the plaintiffs in the defamation suit are the fifth, sixth and seventh defendants in the Suit 843.

[59] In *Ng Joo Soon* (*supra*) the fact that different solicitors were representing the parties in both proceedings were also taken into account by the High Court in refusing the consolidation. And in *Hiwood United Sdn Bhd* (*supra*) it was also observed by the High Court thus:

> [26] Another point to be observed is that there is no common plaintiff in the two suits, therefore, there is no common representation by a single firm of solicitors.

[60] These separate representations would likely render the consolidation inconvenient if not impractical, resulting in unnecessary waste of precious judicial time, of costs as a large number of solicitors will be required to be present in court for case managements of matters which do not concern their clients, as well as other challenges such as the difficulty of fixing trial dates in view of the large number of parties and solicitors involved, and the situation where the solicitors represent the 21 defendants in the Suit 843 will have to hear and examine the evidence and testimony given by witnesses in open court in the Suit 843 and the defamation suits, and *vice versa*. Certain defendants in the Suit 843 are also witnesses in the defamation suits.

Delay In Making This Application

[61] Another factor that militates against the cases being consolidated, tried together or tried one after the other is this. The plaintiffs in this Suit 843 too only filed this application when the court was ready to fix new trial dates for the defamation suits.

[62] No convincing or reasonable explanation was proffered to justify this late filing when the Suit 843 was filed about one year prior, and where the defamation suits were instituted even earlier, about one year before the filing of Suit 843.

[63] The plaintiffs could also be said to be potentially guilty of laches for the delay in the filing of this application. Their averment that they only came to know about the defamation suits on 12 November 2020 is difficult to accept, given that the very first of the defamation suits (Suit 26) was filed on 4 June 2018, some two and a half years prior. It is also unfair to have the defamation suits hanging over the heads of the parties, probably potentially indefinitely because of the uncertainty as to when Suit 843 would be ready for trial.

[64] It is worthy of emphasis that the very first of the defamation suits (Suit 26) was filed some two and a half years ago. And it cannot escape one's attention that this Suit 843 at the same time is very much in a state of limbo in light of the pending interlocutory appeals and stay applications.

[65] Given the situation on the status of the Suit 843 and the defamation suits, it is not unfair or wrong to contend that if this application is allowed, the parties in the defamation suits would most probably have to endure a long wait before they are given the opportunity of being heard or having the merits of their case adjudicated on. That is simply and patently unfair.

[66] Resort to O. 4 r. 1 of the RC 2012 in my view is plainly unsuited in a situation where one of the suits is at an advanced stage of the proceedings, in comparison to the other. Here, the defamation suits are ready for trial and ought to have started on 26 October 2020 if not for the Movement Control Order in force then.

[67] This is in contrast to this Suit 843 which has not even reached the stage of the close of pleadings. The defamation suits should therefore be allowed to proceed in a just, expeditious and economical manner unimpeded by the status of this Suit 843. And this is not to mention the complexity about the multiplicity of parties and legal representations in this Suit 843 and the defamation suits, as highlighted earlier.

Conclusions

[68] It bears repetition that the parties in this Suit 843 and the defamation suits are not the same. Only four defendants in Suit 843 are parties in the defamation suits of which only the second defendant is named as defendant in both Suit 843 and the defamation suits. The said other three defendants in Suit 843 are instead the plaintiffs in the defamation suits. More so, the same parties in the different suits are represented by different counsel. This state of affairs does not promote an efficient and a fair trial process.

[69] Although I accept there may be some degree of overlap on the subject matter, fundamentally it is plainly obvious that the causes of action in these different suits are not the same. The key issues and reliefs too are different. Having the Suit 843 and the defamation suits consolidated, tried together, or tried one after the other, pursuant to this application which was filed late by the plaintiffs in Suit 843, would additionally serve only to delay the start of the trial of the defamation suits given that the defamation suits have already been set for trial but that parties in Suit 843 have not even closed their pleadings. In other words, whatever few common factors in these Suit 843 and the defamation suits that may exist, they are far outweighed by these competing considerations. Based on the test formulated in *Central Securities (Holdings) Bhd* (*supra*) these common facts or subject matter are not of "sufficient importance in proportion to the rest" of the subject matter in the two proceedings.

[70] For the foregoing reasons, as discussed, I find that the objective of saving costs and time of parties cannot be achieved if the Suit 843 and the defamation suits are consolidated, tried together or tried one after the other under O. 4 r. 1 of the RC 2012. It is manifestly not desirable for an order be made as per encl. 206. The application is therefore dismissed, with costs.